(1)

Supreme Court, U.S.
FILED

No. 95-752 NOV 9 - 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

THE COMMON COUNCIL of the City of Charleston,

Petitioner,

V.

WILLIAM BERKLEY JR., CARRIE L. CHANCE, ALLEN R. COPLEY, ALFRED J. CAREY, HARMON H. MARKS, BASIL S. SCOTT and WILLIAM F. THAXTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 9, 1995

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73 pp

QUESTION PRESENTED

Whether the legislative body of a municipality is entitled to absolute legislative immunity against civil rights actions predicated solely upon allegations of improper motive of a legislator or legislators in performing the legislative body's "core" legislative acts, such as budget making?

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In The
Supreme Court of the United States
October Term, 1995

THE COMMON COUNCIL of the City of Charleston,

Petitioner,

v.

WILLIAM BERKLEY JR., CARRIE L. CHANCE, ALLEN R. COPLEY, ALFRED J. CAREY, HARMON H. MARKS, BASIL S. SCOTT and WILLIAM F. THAXTON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

The Common Council of the City of Charleston, West Virginia hereby petitions this Court for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The district court's order, dated December 15, 1993, granted Petitioner's motion to dismiss this action, recognizing absolute legislative immunity barred this suit. (App.B) Following dismissal, on December 16, 1993, the Respondents filed a motion for reconsideration with the district court; the district court reviewed the additional arguments and response of the respondents and affirmed its prior decision that the suit was barred by absolute legislative immunity by order dated January 3, 1994. (App.C) The respondents then appealed to the United States Court of Appeals for the Fourth Circuit, which heard this case on two (2) occasions, the second en banc and issued the opinion dated August 11, 1995 reversing the district court's dismissal of this action and remanding the case to the district court. (App.D)

JURISDICTION

On appeal from the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals issued its opinion reversing the district court's dismissal on August 11, 1995. (App.D). This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction is present pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I, The Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. § 1331, the respondents brought suit against Petitioner the Common Council of the City of Charleston, West Virginia alleging damages caused by the council's failure to include salary increases sought by the respondents and proposed by the Mayor of Charleston, Kent Hall, in the 1993 Budget of Charleston. (App.A) The respondents allege that the council's act in voting and passing a budget which did not include the salary increases they desired constitutes a violation of their First Amendment rights to freedom of political association with the Mayor of Charleston, Kent Hall, whose campaign they supported. (App.A) The plaintiffs allege that the council refused to include the requested salary increases proposed by Mayor Hall in the budget because the council did not support the election of Mayor Hall. (App.A)

The council filed a motion to dismiss, asserting that absolute legislative immunity barred this suit. This motion was initially granted by the United States District Court for the Southern District of West Virginia (hereinafter referred to as the "the trial court") on December 15, 1993. (App.B) The plaintiffs moved for reconsideration. The trial court granted the motion for reconsideration but affirmed its original order of dismissal in the order of January 3, 1994. (App.C)

The respondents then appealed to the United States Court of Appeals for the Fourth Circuit, which heard this case on two (2) occasions, the second en banc and issued the opinion dated August 11, 1995 reversing the district court's dismissal of this action and remanding the case to the district court for further prosecution. (App.D)

REASONS FOR GRANTING THE PETITION

1. This case presents a federal question of first impression, as yet undecided by this Court, which is of significant and far-reaching importance to the municipal legislatures of this Nation. The Supreme Court has long held that the language of 42 U.S.C. § 1983 should not be read to suggest that Congress intended to abrogate well established common law immunity doctrines, such as absolute legislative immunity. Tenney v. Brandhove, 341 U.S. 367, 376 (1951). Despite this disclaimer, this Court and the federal circuits have proceeded in their recent interpretations of § 1983 to accomplish that result. These departures, such as Leatherman v. Tarrant, 507 U.S. 517 (1993), all claim to derive their authority from Monell v. New York City Dept. of Social Services, 436 U.S.658 (1978) or Owen v. City of Independence, 445 U.S. 622 (1980). Monell, which overruled Monroe v. Pape, 365 U.S. 167 (1961), "re-examined" the legislative history of § 1983 which Monroe held foreclosed a § 1983 action against a municipality, and determined in a 360° shift from Monroe, that Congress did intend to include a municipality within the definition of a "person" liable for

damages under § 1983 when it enacted the predecessor acts to § 1983. Monell at 701. Monell contains no examination of the concept of legislative immunity in this context.

Like Monell, Owen does not answer the issue of whether absolute legislative immunity for a municipality survived the enactment of § 1983. In Owen, the Court reviewed the issue of whether a municipality possesses a qualified good faith immunity under common law. Owen, 445 U.S. at 635. Despite its determination that the municipality could not rely upon good faith immunity, the Court hastened to add:

> ... notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have on several occasions, found that a tradition of immunity was so firmly rooted in the common law and which was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." Pierson v. Ray, 386 U.S. 547, 555 (1967). Thus in Tenney v. Brandhove, supra, after tracing the development of an absolute legislative privilege from its source in 16th Century England to its inclusion in the Federal and State Constitutions, we concluded that Congress "would [not] impinge on a tradition so

> well grounded in history and reason by covert inclusion in the general language" of § 1983. 341 U.S. at 376.

Id. at 637.

Certainly no statutory provision exists within § 1983 which abrogates absolute legislative immunity. Although the Court asserts that the immunity must be "firmly rooted" in the common law tradition to be recognized as surviving § 1983's enactment, in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the Court found absolute legislative immunity for regional legislators using a "functional" rather than "historical" analysis. The Supreme Court inferred in Lake Country that the reviewing court should examine the activity performed by the legislators at the time of the alleged constitutional violation, and if the action from which the alleged violation arises is one that is a traditional legislative function, then the absolute immunity should be applied to bar the plaintiffs' lawsuit. Lake Country, 440 U.S. at 405 n.30.

Lake Country is precedent for the proposition that it is not historical tradition but the function performed by legislators that establishes the right to claim absolute legislative immunity. As the Fourth Circuit recognized in its August 11, 1995 Opinion, the budget making acts alleged to be constitutional violations in the present case are purely legislative actions, not executive or administrative acts. (App.D., p.14)

As stated by the Fourth Circuit dissenters to the August 11, 1995 Opinion, public policy demands that the Common Council of the City of Charleston be accorded absolute legislative immunity from the present suit. (App.D., p.17) All the public policy concerns behind the doctrine of absolute legislative immunity are raised by the respondents' suit.

Such public policy concerns were aptly stated in Tenney, supra, by Justice Frankfurter, writing for the majority:

> ... the legislature must be free to speak and act without fear of criminal and civil liability ... The claim of an unworthy purpose does not destroy the privilege. Legislatures are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court ... [cite omitted] that it was not consonant with our scheme of government for a court to inquire into the motives of

> legislators, has remained unquestioned.
>
> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.

Tenney at 378. (Emphasis added.)

In the present suit, the respondents allege that the passage of the 1993 budget, not just a particularized ordinance, violated their constitutional rights. (App.A) Allowing the respondents to maintain this suit, in effect, substitutes the respondents, the trial judge, the jurors, the justices of the United States Court of Appeals for the Fourth Circuit and this Court for the duly elected members of the council when they voted on the 1993 Budget, without virtue of winning any election of the public confidence. Moreover, to allow respondents to maintain this action shall result in an overset of the 1993 budget which was voted into law by those individuals who were duly elected by the public as provided by law. This is the result feared by the Court in Tenney.

The issue of whether absolute legislative immunity applies to the "core" legislative functions such as budget making performed by municipal legislatures is one of importance to municipal governments throughout this nation. As set forth in the next argument, this Court should accept this Petition and issue a Writ of *Certiorari* which results in a ruling which protects municipal legislatures from suits based solely upon the performance of such core legislative functions.

2. Review by this court is necessary to establish the right of a municipal legislature to absolute legislative immunity for its legislative acts. In part, the Fourth Circuit reached its result in this case by incorrectly considering this case as an action brought under § 1983. A review of the complaint shows that the respondents, as plaintiffs below, made no reference to § 1983. (App. A). In fact, since it is a common law suit for alleged violation of the respondents' constitutional rights, there is no authority to hold that § 1983 bars the use of absolute legislative immunity in this regard by the trial court. An additional error was made by the Fourth Circuit when that Court treated this case as one against the City of Charleston when the respondents, who framed the complaint, sued the city council only, choosing not to name the City of Charleston as the defendant.

Even if this case was considered as stating a § 1983 action, absolute legislative immunity bars the action as

held by the trial court. The trial court set forth two related rationales which support this conclusion. The first was stated as follows: (App.B)

> "... [i]t is well-settled in this Circuit that local legislators enjoy absolute immunity from suit for decisions made in their capacity as legislators." West Virginia Pride, Inc. v. Wood County, W.Va., 811 F.Supp. 1142, 1147 (S.D. W.Va. 1993) (Haden, C.J.) (citing Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1983); Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980). Plaintiffs' complaint squarely attacks a classic legislative function of the Council, its vote on the City budget. Budget making is a "quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources." Rateree v. Rocket, 852 F.2d 946, 950 (7th Cir. 1988) (quoting Rateree v. Rocket, 630 F.Supp. 763, 771 (N.D. Ill. 1986).
>
> A budget vote is not rendered an "administrative" employment decision merely because it impacts city employees. Rateree, 852 F.2d at 950-951. (J.A. 72).

The second basis relied upon by the trial court, closely related to the first was:

> "Plaintiffs' allegation that the Council denied their raises solely because of their political support of Mayor Hall would necessarily require an examination of the Council's motive for its vote. Such an inquiry "runs squarely afoul of the doctrine of legislative immunity." Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988). Where a suit would require testimony from legislators regarding their legislative activities, "the doctrine of legislative immunity has full force." Id. citing Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (The speech and debate clause provides federal legislators absolute immunity "not only from the consequences of litigation's results but also from the burden of defending themselves.") (J.A. 73).

The Court's line of cases beginning with Monell and Owen misapply § 1983, by finding that the category of "persons" who may be sued includes municipalities. This conclusion is based upon a faulty reading of the Congressional history of the original civil rights acts. An examination of that Congressional history as cited in Monroe leads to the conclusion that Monell and Owen were

wrongly decided and should be reversed, reinstating the rule of Monroe v. Pape, that municipalities are immune from § 1983 actions.

Accordingly, in Ngiraingas v. Sanchez, 495 U.S. 182 (1989), a case in which the Court determined that a territory is not subject to § 1983 liability, this Court stated the following rule of construction regarding Congressional intent:

> "Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, United States v. Price, 383 U.S., at 801, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it." District of Columbia v. Carter, 409 U.S. 418 (1973) at 432.

Ngiraingas at 192 (emphasis added).

This Court followed this rule of construction in Monroe v. Pape, which was subsequently overruled by Monell. In Monroe, the Court held that a civil rights action could not be maintained against the City of Chicago. The Court in Monroe discussed in great detail the legislative history of the predecessors to § 1983, stating:

When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city, or parish" in which certain acts of violence occurred liable "to pay full compensation" to the person damaged or his widow or legal representative. The amendment was adopted by the Senate. The House, however, rejected it. The Conference Committee reported another version. The House rejected the Conference report. In a second conference the Sherman amendment was dropped and in its place § 6 of the Act of April 20, 1871, was substituted. This new section, which is now R. S. § 1981, 42 U.S.C. § 1986, dropped out all provision for municipal liability and extended liability in damages to "any person or persons, having knowledge that any" of the specified wrongs which are being committed. Mr. Poland, speaking for the House Conferees about the Sherman proposal to make municipalities liable, said:

> "We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede

> from it; that that section imposing liability upon towns and counties must go out or we should fail to agree."

The objection to the Sherman amendment stated by Mr. Poland was that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative.

Much reliance is placed on the Act of February 25, 1871, 16 Stat. 431, entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Section 2 of this Act provides that "the word 'person' may extend and be applied to bodies politic and corporate." This Act has been described as an instance where "Congress supplies its own dictionary." Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527,

536. The present code provision defining "person" (1 U.S.C. § 1) does not in terms apply to bodies politic. See Reviser's Note, Vol. I, Rev. U.S. Stats. 1872, p.19. It should be noted, however, that this definition is merely an allowable, not a mandatory, one. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiff responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.

Monroe, 365 U.S. at 188-91 (emphasis added).

The Petitioner requests that this Court re-review the issues raised in Monroe, Owen, and Monell, in the context of this suit and reach the determination that the result in Monroe was the proper one, particularly in regard to subjecting municipal legislatures to suit for their "core" legislative functions. As stated by the dissent in the Fourth Circuit opinion, absolute legislative immunity is necessary to protect a legislative body, whether it be municipal, state, regional or federal, from suit based on its lawmaking actions.

CONCLUSION

Therefore, and for all the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

John R. Fowler
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November 8, 1995

Attorneys for Petitioner

No. _____

IN THE
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OCTOBER TERM 1995

THE COMMON COUNCIL of the City of Charleston,

Petitioner,

V.

WILLIAM BERKLEY JR., CARRIE L. CHANCE, ALLEN R. COPLEY, ALFRED J. CAREY, HARMON H. MARKS, BASIL S. SCOTT and WILLIAM F. THAXTON,

Respondents.

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November 9, 1995

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

William Berkley, Jr., Carrie L. Chance, Allen R. Copley, Alfred J. Carey, Harmon H. Marks, Basil S. Scott and William F. Thaxton,

Plaintiffs,

v.

The Common Council of the City of Charleston,

Defendant.

COMPLAINT

PARTIES

1. Plaintiffs are all citizens and residents of Kanawha County, West Virginia.

2. Defendant the Common Council of the City of Charleston is the duly established legislative branch of government of the City of Charleston, a municipal corporation existing in Kanawha County, West Virginia.

JURISDICTION & VENUE

3. The Court has original jurisdiction under 28 U.S.C. §1331 in that Plaintiffs have alleged violations of and deprivations of rights accorded by the First Amendment of the United States Constitution and the amount in controversy may reasonably be expected to exceed $50,000, exclusive of interest, costs, and attorney fees. Venue is proper in that the acts complained of

herein occurred in Charleston, Kanawha County, West Virginia within the United States Southern District of West Virginia.

4. Plaintiff William Berkley, Jr. is employed by the City of Charleston in the position of Director of Human Rights.

5. Plaintiff Carrie L. Chance is employed by the City of Charleston in the position of Assistant Personnel Director.

6. Plaintiff Allen R. Copley is employed by the City of Charleston in the position of City Traffic Engineer.

7. Plaintiff Alfred J. Carey is employed by the City of Charleston in the position of Director of Public Grounds and Sexton of Cemeteries.

8. Plaintiff Harmon H. Marks is employed by the City of Charleston in the position of Deputy Director of Parks and Recreation.

9. Plaintiff Basil S. Scott is employed by the City of Charleston as Assistant Director of Refuse (currently Acting Director).

10. Plaintiff William F. Thaxton is employed by the City of Charleston in the position of Street Commissioner.

11. In and before July 1, 1993 the Honorable Kent S. Hall, duly elected Mayor of the City of Charleston, tendered to the Defendant a proposal to provide certain City of Charleston employees an increase in salary over and above the current salary of each such employee.

12. A total of thirty-six City of Charleston

employees were selected by the Mayor of Charleston to receive said increases in salary.

13. The Defendant Common Council of the City of Charleston thereupon singled-out Plaintiffs named herein and refused to provide said Plaintiffs with said increases as requested by the Mayor.

14. The Defendant did agree to provide the other twenty-eight (28) said individuals with said increases as requested by Mayor Kent S. Hall.

15. The Defendant made no inquiry into the job performance of said Plaintiffs, conducted no hearings nor investigations into the job performances of said Plaintiffs, nor provided any meaningful forum in which the Plaintiffs could address the refusal of the Defendant to provide the salary increases.

16. Each of said Plaintiffs was an active supporter of and campaigner for the election of the Honorable Kent Strange Hall to the office of Mayor of the City of Charleston.

17. Upon information and belief, the Plaintiffs allege each of them was deprived of the aforesaid increases in salary by the Defendant because of their political affiliation with the Honorable Kent Strange Hall.

COUNT I

FIRST AMENDMENT VIOLATION

18. Paragraphs one through seventeen are incorporated by reference herein as if fully set forth herein.

19. The Plaintiffs in their exercise of their First Amendment Rights under the United States Constitution actively supported and/or campaigned for the election of Kent S. Hall to the office of Mayor of the City of Charleston.

20. A majority of the members of the Common Council of the City of Charleston did not support the election of Mayor Hall to that office.

21. Upon information and belief, the Plaintiffs were deprived of the aforesaid increases in compensation as of July 1, 1993 because of their political support and affiliation with Kent S. Hall.

Specifically, Plaintiff Chance was deprived of a 12% increase in salary, Plaintiffs Berkley, Copley, Carey, Marks, and Thaxton were deprived of a 15% increase in salary, and Plaintiff Scott was deprived of a 24% increase in salary.

22. Said deprivation is violative of the Plaintiffs First Amendment rights under the United States Constitution to free political association without suffering subsequent deprivations because of such association.

23. As a direct and proximate result of this unconstitutional action each Plaintiff has suffered and will continue to suffer past, present and future lost wages and benefits, embarrassment, humiliation, loss of earning capacity and damage to reputation.

Wherefore each Plaintiff demands judgement against the Defendant for an amount in excess of the jurisdictional limit as determined by a jury together with prejudgment interest and costs.

PLAINTIFFS DEMAND A TRIAL BY JURY.

William Berkley Jr., Carrie L. Chance, Allen R. Copley, Alfred J. Carey, Harmon H. Marks, Basil S. Scott and William F. Thaxton
By Counsel

(s)
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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

WILLIAM BERKLEY, JR., CARRIE L. CHANCE, ALLEN R. COPLEY, ALFRED J. CAREY, HARMON H. MARKS, BASIL S. SCOTT AND WILLIAM F. THAXTON,

Plaintiffs,

v. Civil Action No. 2:93-0758

THE COMMON COUNCIL OF THE CITY OF CHARLESTON,

Defendant.

ORDER

For reasons appearing to the court, it is ORDERED that the above-styled civil action be, and it hereby is, transferred to Chief Judge Charles H. Haden II for reassignment.

DATED: September 8, 1993

(s)
JOHN T. COPENHAVER, JR.
United States District Judge

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Harmon H. Marks, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s)_____
Harmon H. Marks

Taken, subscribed and sworn to before me this 23rd day of August, 1993.

My commission expires: March 8, 2003

(s)_____
Denise L. Milhoan
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Alfred J. Carey, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s)_____
Alfred J. Carey

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: April 14, 2003

(s)_____
Deborah G. Hill
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Carrie L. Chance, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that she has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, she believes them to be true.

(s)_____
Carrie L. Chance

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: March 8, 2003

(s)_____
Denise L. Milhoan
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

William F. Thaxton, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s)_____
William F. Thaxton

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: March 8, 2003

(s)_____
Denise L. Milhoan
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Basil S. Scott, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s)_____
Basil S. Scott

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: March 8, 2003

(s)_____
Denise L. Milhoan
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

William Berkley, Jr., one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s)_____
William Berkley, Jr.

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: March 8, 2003

(s)_____
Denise L. Milhoan
Notary Public

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Allen R. Copley, one of the plaintiffs named in the foregoing Complaint being by me first duly sworn according to law, says that he has read said Complaint and the facts and allegations contained therein are true, and except insofar as they are therein stated to be upon information and belief, he believes them to be true.

(s) _____
Allen R. Copley

Taken, subscribed and sworn to before me this 18th day of August, 1993.

My commission expires: March 8, 2003

(s) _____
Denise L. Milhoan
Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

William Berkley, Jr., Carrie L. Chance, Allen R. Copley, Alfred J. Carey, Harmon H. Marks, Basil S. Scott and William F. Thaxton,

Plaintiffs,

v.

SUMMONS IN A CIVIL ACTION

Civil Action No. 2:93-0758

The Common Council of the City of Charleston,

Defendant.

TO:
The Common Council of the City of Charleston
501 Virginia Street
Post Office Box 2749
Charleston, WV 25330

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY:
James B. Lees, Jr.
Hunt, Lees, Farrell & Kessler
7 Players Club Drive
Post Office Box 2506
Charleston, WV 25329-2506

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

August 23, 1993

CLERK DATE

(s)

Tamara Hey
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

William Berkley, Jr., Carrie L. Chance, Allen R. Copley, Alfred J. Carey, Harmon H. Marks, Basil S. Scott and William F. Thaxton,

Plaintiffs,

v. Civil Action No. 2:93-0758

The Common Council of the City of Charleston,

Defendant.

CERTIFICATE OF SERVICE

I, James B. Lees, Jr., hereby certify that the foregoing **"Plaintiffs' First Set of Interrogatories and Requests for Production"** has been duly served via hand-delivery, this 23rd day of August, 1993, upon:

James Stucky, Clerk
The Common Council of the City of Charleston
501 Virginia Street
Post Office Box 2749
Charleston, WV 25330

(s)_____
James B. Lees, Jr.
HUNT, LEES, FARRELL & KESSLER
7 Players Club Drive
Post Office Box 2506
Charleston, WV 25329-2506

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

WILLIAM BERKLEY, JR., et al.
Plaintiffs,

v. Civil Action No. 2:93-0758

THE COMMON COUNCIL of the City of Charleston,
Defendant.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this day, the Court **ORDERS** as follows:

1. Defendant's motion to dismiss is **GRANTED**;

2. This action is **DISMISSED** and stricken from the docket.

The Clerk is directed to send a copy of this Order to counsel.

ENTER: December 15, 1993

(s)
Charles H. Haden II, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

WILLIAM BERKLEY, JR., et al.
Plaintiffs,

v. Civil Action No. 2:93-0758

THE COMMON COUNCIL of the City of Charleston,
Defendant.

MEMORANDUM OPINION AND ORDER

Pending is Defendant's motion to dismiss, filed October 20, 1993. Plaintiffs have not replied or otherwise responded to the motion. For reasons set forth below, the Court **GRANTS** the motion.

I.

Plaintiffs are employees of the City of Charleston, West Virginia,[1] who actively supported the candidacy of the City's Mayor Kent S. Hall. In July, 1993, Mayor Hall recommended the Charleston Common Council ("the Council"), the City's legislative branch of government, award pay raises to 36 city employees, including Plaintiffs. The Council granted raises to 28 of the employees, but rejected Plaintiffs' proposed raises. Plaintiffs complain the Council denied their raises solely because of their political

[1] Plaintiffs in this case include the City's director of human rights, assistant personnel director, traffic engineer, director of public grounds and sexton of cemeteries, deputy director of parks and recreation, assistant director of refuse, and street commissioner.

affiliation with Mayor Hall, in violation of their First Amendment rights. Defendants filed this motion to dismiss, alleging Plaintiffs' suit is barred because the Council is immune from suits challenging its legislative actions.

II.

This Court noted recently "[i]t is well-settled in this Circuit that local legislators enjoy absolute immunity from suit for decisions made in their capacity as legislators." West Virginia Pride, Inc. v. Wood County, W. Va., 811 F. Supp. 1142, 1147 (S.D. W. Va. 1993) (Haden, C.J.) (*citing* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989); Scott v. Greenville County, 716 F.2d 1409, 1422 (4th Cir. 1983); Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980)). Plaintiffs' complaint squarely attacks a classic legislative function of the Council, its vote on the City budget. Budgetmaking is "a quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources." Rateree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988) (*quoting* Rateree v. Rockett, 630 F. Supp. 763, 771 (N.D. Ill. 1986)).

A budget vote is not rendered an "administrative" employment decision merely because it impacts city employees. As the Seventh Circuit stated in Rateree:

> Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one....Employment decisions are not administrative when accomplished through traditional legislative functions. They are not "employment decisions" at

all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct.

Rateree, 852 F.2d at 950-951.

Plaintiff's allegation the Council denied their raises solely because of their political support of Mayor Hall would necessarily require an examination of the Council's motive for its vote. Such an inquiry "runs squarely afoul of the doctrine of legislative immunity." Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988). Where a suit would require testimony from legislators regarding their legislative activities, "the doctrine of legislative immunity has full force." Id. *citing* Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (The speech and debate clause provides federal legislators absolute immunity "not only from the consequences of litigation's results but also from the burden of defending themselves.")).

III.

For these reasons, the Court concludes this action is barred by the Council's absolute legislative immunity. The Court **DISMISSES** this action and **ORDERS** it stricken from the docket.

The Clerk is directed to send a copy of this Order to counsel.

ENTER: December 15, 1993

(s)
Charles H. Haden II, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

WILLIAM BERKLEY, JR., et al.
Plaintiffs,

v. Civil Action No. 2:93-0758

THE COMMON COUNCIL of the City of Charleston,
Defendant.

MEMORANDUM OPINION AND ORDER

Pending is plaintiffs' motion to reconsider. By Memorandum Opinion and Order entered December 15, 1993, this Court granted defendant's motion to dismiss, concluding this action is barred by defendant's absolute legislative immunity. The Court noted in its Order plaintiffs had filed no response to defendant's motion to dismiss.

Plaintiffs urge the Court to reconsider its decision granting the motion to dismiss. Although plaintiffs filed no response to defendants' motion in accordance with Local Rule 2.03[1], plaintiffs suggest the Court should consider arguments set forth in their response to defendant's

[1]Local Rule 2.03 provides, in relevant portion, "Memoranda and other matter in opposition to motions shall be submitted to the Clerk, with copies also submitted to the assigned judge and served on opposing counsel or parties entitled thereto within fourteen days from the date of service of the motion."

motion for a protective order.[2] The Court did not consider plaintiffs' response to the motion for a protective order when ruling on defendant's motion to dismiss.

The Court finds plaintiffs' motion was made in good faith, and considers the arguments on legislative immunity set forth in plaintiffs' filing helpful to its evaluation of the motion to dismiss. Accordingly, the Court **GRANTS** plaintiffs' motion to reconsider.

Having reexamined defendant's motion to dismiss in light of plaintiffs' arguments, the Court concludes there is yet no basis for modification of its previous decision. It remains well-settled in this Circuit that local legislators enjoy absolute immunity from suit for decisions made in their capacity as legislators.[3] Baker v. Mayor and City Council of Baltimore, 894 F.2d 679, 681 (4th Cir. 1990), *cert. denied*, 498 U.S. 815 (1990); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865

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[2]Defendant filed its motion to dismiss on October 20, 1993. On November 19, 1993, defendant filed its motion for a protective order. Plaintiffs responded to the motion for a protective order on December 10, 1993.

[3]The Court is aware that the concurrence and dissent in the Fourth Circuit's recent decision in Hollyday v. Rainey, 964 F.2d 1441 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 636 (1992), suggest absolute legislative immunity for municipal legislators perhaps is founded on unstable ground. Id. at 1441-49 (Luttig, J., concurring; Butzner, J., dissenting). Nonetheless, as Judge Hall's opinion in Hollyday reflects, under current Circuit law, the doctrine of legislative immunity insulates governmental entities from liability for legislative decisions alleged to have been made because of improper motives.

F.2d 77, 79 (4th Cir. 1989); Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988); Scott v. Greenville County, 716 F.2d 1409, 1422-23 (4th Cir. 1983); Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980); West Virginia Pride, Inc. v. Wood County, W.Va., 811 F. Supp. 1142, 1147 (S.D. W. Va. 1993) (Haden, C.J.).

Accordingly, the Court **CONCLUDES** its Memorandum Opinion and Order and Judgment Order entered December 15, 1993, granting Defendant's motion to dismiss and ordering this case dismissed and stricken from the docket, remain in full force and effect in all respects.

The Clerk is directed to send a copy of this Order to counsel.

ENTER: January 3, 1994

(s)
Charles H. Haden II, Chief Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM BERKLEY, JR.; CARRIE L. CHANCE; ALLEN R. COPLEY; ALFRED J. CAREY; HARMON H. MARKS; BASIL S. SCOTT; WILLIAM F. THAXTON,

Plaintiffs-Appellants,

v.

THE COMMON COUNCIL OF THE CITY OF CHARLESTON,

Defendant-Appellee.

REGINA ALEXANDER,

Amicus Curiae.

No. 94-1121

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden II, Chief District Judge.
(CA-93-758-2)

Argued: June 6, 1995

Decided: August 11, 1995

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Reversed and remanded by published opinion. Judge Luttig wrote the majority opinion, in which Chief Judge Ervin, Judges Hall, Murnaghan, Wilkins, Niemeyer, Hamilton, Williams, Michael, and Motz

and Senior Judge Phillips joined. Senior Judge Phillips wrote a special concurring opinion, in which Chief Judge Ervin and Judge Murnaghan joined. Judge Widener wrote a dissenting opinion. Judge Wilkinson wrote a dissenting opinion, in which Judge Russell and Judge Widener joined.

COUNSEL

ARGUED: James Anthony McKowen, HUNT, LEES, FARRELL & KESSLER, Charleston, West Virginia, for Appellants. John Richard Fowler, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Charleston, West Virginia, for Appellee. ON BRIEF: Blake Benton, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Charleston, West Virginia, for Appellee. Martha A. Geer, PATTERSON, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Amicus Curiae.

OPINION

LUTTIG, Circuit Judge:

We heard this case *en banc* to decide whether a municipality, here the City of Charleston, is entitled to absolute immunity from liability under 42 U.S.C. § 1983 for the unconstitutional enactments and actions of its local legislature. The numerous circuits that have addressed the question have unanimously concluded, in recognition of Supreme Court precedent, that municipalities are not entitled to such an immunity. We now join our sister circuits and hold that a municipality is not immune from liability under section 1983 for the enactments and actions of the local legislative body.

I.

In *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court held that municipalities and other local governments are "persons" subject to liability for constitutional violations under 42 U.S.C. § 1983. *Id.* at 690. A municipality may only be

found liable under section 1983, however, where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* Since *Monell*, municipalities and local governments have repeatedly, and unsuccessfully, attempted to secure some immunity from liability in suits brought under section 1983.

In the course of adjudicating these various claims to immunity, the Supreme Court has left no doubt that municipalities and local governments are not entitled to immunity from suits brought under section 1983. Chief Justice Rehnquist, writing for a unanimous Court, could not have been any clearer when he observed recently that "unlike various government officials, municipalities do not enjoy immunity from suit — either absolute or qualified — under § 1983." *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1162 (1993). The Chief Justice based his observation in *Leatherman* on the Court's decision in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), where, in denying municipalities a qualified immunity defense to claims brought under section 1983, *see id.* at 650, the Court "held" that "municipalities have no immunity from damages liability flowing from their constitutional violations," *id.* at 657. In the face of such clear and broad pronouncements by the Supreme Court, we have little trouble concluding that a municipality is not immune from section 1983 liability for unconstitutional enactments and other legislative activities of the local legislature.[1]

Apart from the unequivocal statements in the Court's opinions, the reasoning employed by the Court in *Owen* forecloses any other conclusion. In *Owen*, the Court explained that it will only recognize an

[1]Our dissenting colleagues do not challenge our reading of this controlling caselaw. They ground their dissent instead exclusively on what they perceive to be the unacceptable policy implications of our decision. Ours, however, is not to craft a wise or effective policy, but rather, only to interpret section 1983 consistently with the Supreme Court's interpretation of that statute. In performing this task, we must assume that, to the extent they are relevant, the Court considered the forceful policy arguments advanced by the dissent before making the categorical statements that it did in *Monell*, *Owen*, *Lake Country Estates*, and *Leatherman*.

immunity from suit under section 1983 where "a tradition of immunity was so firmly rooted in the common law [at the time of the statute's enactment] and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Id.* at 637. After surveying the common law at the time of the enactment of section 1 of the Civil Rights Act of 1871, the predecessor statute to section 1983, and after evaluating the public policy considerations behind municipal liability, the Court held that there was no justification in history or tradition, or in policy, for affording municipalities immunity from suit under section 1983.

With regard to the inquiry into tradition, the Court unqualifiedly concluded that "there is no tradition of immunity for municipal corporations." *Id.* at 638. Though the Court was able to identify two common law doctrines that might have served as a basis for municipal immunity, it held that neither of these immunities survived Congress' enactment of section 1 of the Civil Rights Act of 1871. *Id.* at 644.

The first of these common law doctrines "sought to distinguish between a municipality's 'governmental' and 'proprietary' functions," with the municipality subject to liability for the latter, but immune from liability as to the former. *Id.* The Court found that by 1871, the immunity from suit for a municipality's "governmental functions" had largely been "nullified" by the states. *Id.* at 645-46; *see also id.* at 646 (referring to "nominal existence" of such an immunity). In any event, because the governmental function immunity was rooted in principles of sovereign immunity, *id.* at 645, the Court held that the immunity was "obviously abrogated" by the enactment of section 1983, *id.* at 647:

> By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress — the supreme sovereign on matters of federal law — abolished whatever vestige of the State's sovereign immunity the municipality possessed.

Id. at 647-48 (footnote omitted).

The Court in *Owen* identified as a second common law protection available to municipalities in the nineteenth century a doctrine that

"immunized a municipality for its 'discretionary' or 'legislative' activities," but which did not protect municipalities from liability for acts "ministerial" in nature. *Id.* at 644. This doctrine was grounded in separation of powers principles, the concern being that "[f]or a court or jury . . . to review the reasonableness of the city's judgment on [discretionary or legislative] matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government." *Id.* at 648. As it had found with the municipality's common law immunity from liability for its "governmental" actions, the Court found the municipality's immunity from liability for its "discretionary" or "legislative" activities to be largely hollow at the time Congress enacted the Civil Rights Act of 1871. *Id.* at 649. More importantly, the Court found that the very rationale behind the immunity for discretionary activities precluded any claim that the immunity survived the enactment of section 1983:

> Th[e] common-law doctrine [of legislative or discretionary immunity] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Id. at 649. The Court in *Owen* thus rejected any sovereign immunity or separation of powers justification for municipality immunity from suit under section 1983, and the Court was able to identify no other possible historical or doctrinal source of immunity from suit for constitutional violations.

If there were any doubt that the Court's pronouncements in *Leatherman* and *Owen*, coupled with the Court's reasoning in *Owen*, preclude the municipal legislative immunity asserted in this case, it is obvious from the facts before the Court in *Owen* that the abrogation of municipality immunity effected by section 1983 extends as well to

a municipality's legislative activities. In *Owen*, the local Chief of Police claimed that the City of Independence, the City Manager, and members of the City Council in their official capacity, had deprived him of his protected liberty interest in his "good name, reputation, honor, or integrity" without due process of law, in violation of the Fourteenth Amendment. *Id.* at 633 n.13 (quoting *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971)). Specifically, he alleged that "the city — through the unanimous resolution of the City Council — released to the public an allegedly false statement impugning [his] honesty and integrity." *Id.*[2] Thus, the plaintiff in *Owen*, like the plaintiffs in this case, directly challenged the city's exercise of a core legislative function, embodied in an official vote of the local legislative body.[3] After considering both the nature of the asserted constitutional

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[2]The City Council's involvement in the unconstitutional deprivation in *Owen* was extensive:

> On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation. Among other allegations, Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, *the City Council passed Roberts' motion with no dissents and one abstention.*

Owen, 445 U.S. at 627-29 (footnotes omitted) (emphasis added).

[3]Actions virtually identical to those of the City Council in *Owen* were held to be legislative in nature in *Tenney* v. *Brandhove*, 341 U.S. 367, 377-78 (1951). In *Tenney*, the plaintiff charged a committee of the California Senate with violating his constitutional rights by holding a hearing in which the committee impugned plaintiff's reputation and at which the committee chairman "read into the record a statement concerning an

violation and the City Council's role in causing the violation, the Court was left with "no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law." *Id.* at 634 n.13. The Court's denial to the municipality of a qualified immunity defense for the unconstitutional legislative activities in *Owen* leads inescapably to the conclusion that a municipality is not entitled to an absolute immunity for the very same governmental conduct. *See, e.g., Hollyday* v. *Rainey*, 964 F.2d 1441, 1445 (4th Cir.) (opinion of Luttig, J.) ("The reasoning of the Court in *Owen* would appear to apply with equal force to a claim of absolute municipal immunity based upon the testimonial privilege of the municipality's officers and agents."), *cert. denied*, 113 S. Ct. 636 (1992).

Indeed, the Court routinely cites the enactment of legislation as the prototypical government conduct that can give rise to liability under *Monell*'s "policy or custom" requirement. In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), for instance, a majority of the Court joined Justice Brennan's observation that "[n]o one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." *Id.* at 480; *see also id.* at 483 n.12 (plurality) ("[I]f county employment policy was set by the Board of County Commissioners . . . that body's decisions would provide a basis for county liability."). Even the dissenters in *Pembaur* agreed that an unconstitutional enactment of a local legislature could give rise to municipal liability under section 1983:

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alleged criminal record of [plaintiff's], a newspaper article denying the truth of [plaintiff's] charges, and a denial by the Committee's counsel — who was absent — that [plaintiff's] charges were true." *Id.* at 371. The Court in *Tenney* granted the individual legislators absolute immunity from suit because these actions were within "the sphere of legitimate legislative activity." *Id.* at 376; *see also Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. Unit A May 1981) ("[T]he constitutional violation about which the plaintiff in *Owen* could legally complain was caused by the members of the city council while performing a legitimate legislative function."), *cert. denied*, 455 U.S. 907 (1982). On similar facts in *Owen*, the municipality was not afforded any immunity.

> Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation, or official records indicate that the resulting decisions taken "may fairly be said to represent official policy." *Monell*, *supra*, at 694. *Owen* v. *City of Independence*, 445 U.S. 622 (1980), provides an example. The City Council met in a regularly scheduled meeting. One member of the Council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the Council passed the motion with no dissents and one abstention. *Id.* at 627-29. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

Pembaur, 475 U.S. at 500 (Powell, J., dissenting). And in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), a case in which the Court divided three ways over the proper standard for determining when municipal action amounts to a custom or policy, the Court was unanimous that a municipality can and will be held liable under section 1983 for an unconstitutional exercise of power by the municipality's legislative body. *See id.* at 126 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) ("[O]ne would have to conclude that policy decisions made . . . by the Mayor and Aldermen," who are authorized to adopt ordinances relating to personnel administration, "would be attributable to the city itself."); *id.* at 125 (actions of "official or body that has the responsibility for making law" can give rise to municipal liability under section 1983); *id.* at 138 (Brennan, J., concurring in the judgment, joined by Marshall and Blackmun, JJ.) ("Nor have we ever doubted that a single decision of a city's properly constituted legislative body is a municipal act capable of subjecting the city to liability."); *id.* at 140 ("[I]n *Owen* and *Fact Concerts* we deemed it fair to hold municipalities liable for the isolated, unconstitutional acts of their legislative bodies . . . ."); [4] *id.* at 147 (Stevens,

[4] In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court considered a section 1983 claim against a municipality that was

J., dissenting) (presuming that legislative acts can give rise to municipal liability).

Our holding today that a municipality does not enjoy immunity with respect to the acts of its legislative body, thus, should come as no surprise. In fact, every other circuit that has considered this issue has either held or presumed that a municipality is not entitled to absolute legislative immunity from suits brought under section 1983. *See, e.g., Goldberg* v. *Town of Rocky Hill*, 973 F.2d 70, 72, 74 (2d Cir. 1992) (rejecting "out of hand" the claim that a municipality "is entitled to absolute immunity for its legislative acts," and "hold[ing] that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983"); *Aitchison* v. *Raffiani*, 708 F.2d 96, 100 (3d Cir. 1983) (citing *Reed* v. *Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983)) ("[L]iability against the municipality is not precluded simply because the [local legislators] were found immune in their individual capacities."); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983) (holding that a "municipality's liability for [the official acts of municipal policy makers] extends to acts for which the policy-making officials . . . might enjoy absolute immunity because the acts were legislative or judicial in character"); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982) (complete immunity of county legislators does not immunize county); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. Unit A May 1981) ("We consider the Supreme Court's decision in *Owen* and its caveat in *Lake Country Estates* to be dispositive of the city's argument and hold that the City of Lafayette is not entitled to a legislative immunity from damages under § 1983 . . . ."), *cert. denied*, 455 U.S. 907 (1982); *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 613 n.7 (8th Cir. 1980) ("*Owen*

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premised on the unconstitutional conduct of the local legislature. The plaintiffs in *Fact Concerts* challenged the Newport City Council's decision, rendered through a vote of the Council, to cancel a city license issued to a concert promoter unless the promoter removed the band Blood, Sweat and Tears from the concert program. *See id.* at 250-52 (plaintiff charged city and City Council with content-based censorship based upon the Council's "vote[ ] to cancel the license for both days unless Blood, Sweat and Tears were removed from the program").

would seem to provide a remedy for unconstitutional municipal legislation." (emphasis omitted)).

In the face of this overwhelming authority, the City of Charleston attempts to justify its claim of absolute legislative immunity by reference to the tradition and policy justifications supporting the legislative immunity for individual legislators. While there is indeed a long tradition of granting individual legislators at all levels of government a broad immunity from suits based upon their legitimate legislative activities,[6] and though there are undoubtedly strong public policy jus-

[6]The protections afforded federal legislators are found in the Constitution itself. *See* U.S. Const. art. I, § 6, cl. 1 ("The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place."); *Gravel* v. *United States*, 408 U.S. 606, 615 (1972) (finding "incontrovertible" the conclusion that the Speech or Debate Clause "at the very least protects [Congressmen] from criminal or civil liability and from questioning elsewhere than in the [Congress]" for matters related to the legislative process). The majority of states have adopted similar constitutional provisions granting state legislators absolute immunity from suits based on actions and statements made during the legislative process. *See Tenney* v. *Brandhove*, 341 U.S. 367, 375 (1951).

Building on this tradition, the Supreme Court has also recognized an absolute immunity from section 1983 liability for state and regional legislators, who are not otherwise protected by the Speech or Debate Clause and whose state immunity would not protect them from suits brought under section 1983. *See id.* at 376 (holding that state legislators are entitled to immunity from civil liability under section 1983 for actions and statements made "in the sphere of legitimate legislative activity"); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979) (holding that legislators serving on regional, multi-state entity are entitled to absolute immunity on reasoning of *Tenney*).

And, though the Supreme Court has expressly reserved the issue, *see id.* at 404 n.26, most circuits, including this one, have relied on *Tenney* and *Lake Country* to hold that local legislators, sued in their individual capacity, are entitled to absolute immunity from section 1983 suits relating to their legitimate legislative activities. *See Bruce* v. *Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) ("[I]f legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of § 1983."); *see also Goldberg*, 973 F.2d at 72 (collecting cases).

tifications for such immunity,[9] the Supreme Court has instructed that the defenses available to an official in a personal capacity action simply "are unavailable" in a suit against a governmental entity. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citing *Owen*); *see also Owen*, 445 U.S. at 638 n.18 (factors supporting an immunity for officers sued in individual capacity "differ[ ] significantly" from factors considered when "only the liability of the municipality itself is at issue").

The Court has made clear that neither the tradition nor the public policy considerations supporting a broad legislative immunity for legislators sued in their individual capacity has persuasive force when the liability of the municipality is at issue. The Court foreclosed reliance on the tradition of legislative immunity for individual legislators when it stated in unequivocal terms that "there is no tradition of immunity for municipal corporations." *Id.* at 638.

As to the public policy behind granting individual officers an immunity, the Court explained in *Owen* that the "overriding considerations of public policy," which, on occasion, have led the Court to conclude that an "official be given a measure of protection from personal liability," are "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." *Id.* at 653. The Court in *Owen* cited two such policy considerations: first, the injustice of

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[9]As the Court observed in *Tenney*,

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377; *see also Collinson v. Gott*, 895 F.2d 994, 1007 (4th Cir. 1990) (Wilkinson, J., concurring in the judgment) ("[F]ederal trials may yet degenerate into partisan affairs if litigation provides the political opponents of presiding officers with another forum to score points."); *id.* at 1008 ("The flow of information through th[e] [legislative] process could be severely jeopardized if every public meeting carried with it the threat of civil liability . . . .").

holding a public officer personally liable for making discretionary decisions mandated by his public employment, and second, "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 654 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974)). The Court dismissed the first concern as simply inapplicable when the municipality's liability is at issue. *See id.* And, though the second rationale, concerned with the deterrent effect of an adverse judgment, would seem to apply to municipalities as well as to individuals, the Court nonetheless found that this rationale likewise "loses its force when it is the municipality, in contrast to the official, whose liability is at issue." *Id.* at 655. The Court explained that

> [a]t the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Id. at 655-56 (citations and footnotes omitted) (emphases in original); *see also id.* at 653 n.37 (citing *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.29 (1979)) ("[T]he justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself.").

Indeed, in the Court's view, the very existence of an immunity for individual officials cuts strongly in favor of denying immunity to the municipality the official represents. In *Owen*, for instance, the Court concluded that, in light of the qualified immunity already afforded to officials sued individually, the only way to "properly allocate[ ]" the costs of constitutional violations among government officials, municipalities, and victims, is to deny an immunity defense to the municipality. *Id.* at 657. And in *Lake Country Estates*, the Court justified its grant of absolute immunity to regional legislators serving on the Tahoe Regional Planning Agency (TRPA), in part on the fact that a plaintiff would still be able to proceed against the regional entity:

> If the [legislators serving on TRPA] have enacted unconstitutional legislation, *there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.*

Lake Country Estates, 440 U.S. at 405 n.29 (emphasis added).[7]

In sum, though the issue before us today is an important one, it is ultimately easily resolved. The Supreme Court effectively answered the question fifteen years ago in *Owen*. A unanimous Court in *Leatherman* recently reaffirmed *Owen*, and every other circuit to have addressed the issue has read *Owen* as foreclosing the possibility of legislative immunity for municipalities. In accord with this controlling, and otherwise impressive, body of authority, we hold that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983.

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[7]Similarly, in granting absolute immunity to state legislators in *Tenney*, the Court was careful to "note[ ] that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where . . . the legislature seeks the affirmative aid of the courts to assert a privilege." *Tenney*, 341 U.S. at 378; *see also id.* at 379 (Black, J., concurring) ("It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators."); *id.* ("The Court holds that the Civil Rights statutes were not intended to make legislators *personally* liable for damages to a witness injured by a committee exercising legislative power." (emphasis added)).

II.

In the instant case, the appellants' complaint alleged that, in enacting the annual budget for the City of Charleston in 1993, Charleston's Common Council denied appellants a salary increase on the impermissible ground that the appellants had actively supported a candidate in the prior mayoral election other than the one favored by a majority of the members of the Common Council, in violation of the First Amendment. The plaintiffs thus directly challenged the Common Council's execution of a core legislative function. J.A. at 72 (opinion of district court) ("Plaintiffs' complaint squarely attacks a classic legislative function of the Council."); *see also Rateree* v. *Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) ("Budgetmaking is a quintessential legislative function reflecting the legislators' ordering of policy priorities in the face of limited financial resources." (citation omitted)).[6]

The district court dismissed the complaint without addressing the merits of plaintiffs' claim, holding that the City of Charleston, the real party in interest in this case, *see Goldsmith* v. *Mayor and City Council of Baltimore*, 987 F.2d 1064, 1066 n.2 (4th Cir. 1993), is absolutely immune from suits challenging the activities of the Common Council of the City of Charleston. The district court reasoned:

> Plaintiffs' allegation that the Council denied their raises solely because of their political support of Mayor Hall would necessarily require an examination of the Council's motive for its vote. Such an inquiry "runs squarely afoul of the doctrine of legislative immunity." Where a suit would require testimony from legislators regarding their legislative activities, "the doctrine of legislative immunity has full force."

J.A. at 73 (citation omitted). Because we hold today that the City of Charleston is not entitled to absolute immunity under section 1983

[6]Because the Common Council's decision to deny the salary increases was legislative, we decline the appellees' invitation to deny the City's claim of legislative immunity on the ground that the Council's action was administrative in nature. *See Roberson* v. *Mullins*, 29 F.3d 132, 135 (4th Cir. 1994).

from suits involving the decisions and enactments of Charleston's Common Council, the judgment of the district court is reversed. To the extent that our opinions in *Baker* v. *Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir.), *cert. denied*, 498 U.S. 815 (1990), and *Schlitz* v. *Commonwealth of Virginia*, 854 F.2d 43, 45-46 (4th Cir. 1988),* can be read to confer legislative immunity on municipalities from suits brought under section 1983, those decisions are overruled.

The judgment of the district court is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED

PHILLIPS, Senior Circuit Judge, specially concurring:

I concur in the majority opinion, which I think admirably demonstrates why extant Supreme Court precedents compel the result reached.

I write specifically only to state my understanding that the laudatory comments in footnote 1 respecting the dissenting opinion are not intended to imply that were we free to do so, we would accept its policy arguments for granting municipalities absolute immunity to § 1983 claims for monetary relief for their unconstitutional legislative acts. It may be proper at our level to use a dissenting opinion as a vehicle for suggesting re-examination of extant Supreme Court authority on policy grounds, but I would not want to be thought persuaded by those made in the dissent here. With all respect to the elegance and fervor with which its political theories are advanced, I think it greatly overstates the threats to democratic government at the local level that it suggests flow from exposing municipalities to such

*Under *Baker* and *Schlitz*, Charleston's council members may be privileged from testifying in federal district court as to their motives in enacting legislation. Because appellants do not challenge this testimonial privilege, except to the extent that such a privilege could be interpreted to afford municipalities immunity from liability under section 1983, we do not address herein the vitality of this privilege in the wake of *Owen* and today's holding.

suits. And, I believe it important to point out that there is not a shred of evidence in the record before us, either in the form of anecdotal or expert opinion testimony or by way of "Brandeis brief," to support the assertion that any such practical threats actually exist and are being experienced in the real world. In the absence of such evidence, I think the more appropriate policy assumption—were any appropriate in the case presented to us—is that there is no such inhibiting effect on local government as the dissent posits. We are not referred to any other lower federal or state court decision which has expressed similar concerns, though municipal exposure to such claims has been a generally recognized legal reality now for years. The "chilling effect" on official conduct that is posited is one that could only be experienced by individual legislators, and they have the protections both of absolute legislative immunity to suit and of testimonial privilege if they prefer not even to participate in litigation against the municipality itself. And, the experience of history which presumably informed the common law's refusal to accord such immunity (as documented in the Supreme Court decisions refusing to accord it as to § 1983 claims) must surely have confirmed that no such inhibiting effect was being generally experienced.

Chief Judge Ervin and Judge Murnaghan join in this special concurrence.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I agree with and concur in Judge Wilkinson's excellent dissenting opinion.

In my opinion, the decision of the majority in this case is contrary to the most fundamental notions of our form of representative government. The subordination of the legislative branch of government espoused by the majority in this case will prove to be as fatal to this commonwealth as that Plato warned of.

> Where there are three orders, then, any plurality of functions or shifting from one order to another is not merely utterly

> harmful to the community, but one might fairly call it the extreme of wrongdoing. And you will agree that to do the greatest of wrongs to one's own community is injustice.
>
> Surely.

The Republic of Plato, Oxford University Press 1968-3 reprint, Chapter XII, p. 129.

WILKINSON, Circuit Judge, dissenting:

The practical consequence of the majority's decision is to subject local legislators to federal suit for routine votes on a municipal budget. By doing so, we have consigned to federal court the most basic and important acts of a democracy. This amounts, literally, to local government by lawsuit. Because such a result stretches 42 U.S.C. § 1983 beyond all reasonable bounds and does grave harm to our fundamental democratic notions of political participation and representation, I respectfully dissent.

I.

This controversy involves nothing more than a political dog fight over a municipal budget — the kind that arises in local governing bodies every day. If municipal budget disputes must now regularly be replayed in actions for damages under 42 U.S.C. § 1983, then the federal courtroom will come to replace the county meeting hall and city council chambers as the cornerstone of American politics. With all respect to the majority, the Supreme Court has not sounded this sort of death-knell for democratic governance.[1]

[1]My good colleagues in the majority suggest that their approach is governed by precedent, while the dissenting opinion is somehow driven by policy. *See* majority opinion note 1. In this regard, the majority summons to its aid extended quotations, but those quotations simply do not address the situation at hand. *See* dissenting opinion §§ II and III, *infra*. Specifically, the precedent relied upon by the majority does not contain a single reference to the propriety of turning routine votes on a municipal budget into a § 1983 damages dispute. Indeed, the majority does not contend otherwise, but only states that "we must assume" that the Supreme

The majority's rationale is that this outcome is appropriate because plaintiffs have sued a municipal legislative entity for damages rather than the individual legislators themselves. The majority apparently believes that because legislators remain personally immune from damages for a vote on a municipal budget, their immunity interests are sufficiently vindicated. It is a mistake, however, to equate the sum of the immunity interests in this case with the prospects of personal monetary liability. Much more is at stake.

The absence of municipal immunity for a legislator's votes on a municipal budget erodes the viability of the entire local political process. The abrogation of municipal immunity for such votes will subtly transform the nature of political accountability. Pecuniary penalties, albeit against the municipality, will come to substitute for traditional reckonings at the polls. Local legislators will have to explain their votes on legislative appropriations to a court as well as to the electorate. That is not how democracy was meant to function.

This case will prove all too typical. The complaint presents a budget dispute involving municipal salary outlays between the council supporters and opponents of Charleston Mayor Kent Strange Hall. Budget fights of this kind invariably produce winners and losers. Under the majority's ruling, the losers of such struggles now have an engraved invitation to proceed to federal court. It will be simple to portray *any* budgetary cut as plaintiffs have here — as an act of "political retaliation" in violation of the First Amendment. Indeed, a complaint may be expected to characterize any legislative success of an opposing faction in its most pejorative political light. Under Fed. R. Civ. P. 12(b)(6), a federal court must accept those allegations as true. Justice Frankfurter must have had this dispute in mind when he wrote:

Court has considered and disposed of this question. I think it legitimate that there be at least a pause before *the* most essential function of local government is swept away by "assumption." The majority has decided a legal question of first impression, and has taken a significant practical leap. Surely it will seem so to innumerable elected office-holders, who suddenly discover that their votes on a budget are subject to judicial review, and that the legislative vestiges of local government are now justiciable as a matter of nothing more than *ipse dixit*.

"[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are *not* the place for such controversies." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (emphasis added).

The damage done to the political process will be acute. Lawsuits by disgruntled individuals may replace the voice of the electorate as the agent of municipal change and the instrument of municipal policy. This sad development is made worse because it occurs in the context of some 85,000 city and county governments, which were established to provide the purest and most direct form of political participation available to American citizens. "In the township, as well as everywhere else, the people are the source of power; but nowhere do they exercise their power more immediately." 1 Alexis de Tocqueville, *Democracy in America* 64 (P. Bradley ed. 1945).

Lawsuits such as this one also substantially weaken the ability of individual legislators to carry out the will of the voters. Instead of enjoying the freedom to cast votes according to their consciences and the wishes of their constituents, legislators must now look over their shoulders at the possible legal consequences of a vote cast or an argument advanced. Statements made on items in a local budget will now turn up as evidence of unconstitutional "political" motive in federal court. Legislators will have to consider how legislative action will be viewed by the most litigious members of their community. Such consequences are clearly contrary both to the purpose of § 1983 and the ideals of good government. As the Supreme Court has noted, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone v. United States*, 493 U.S. 265 (1990). The very purpose of immunity is "to insure that the legislative function may be performed without fear of outside interference." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980).

These concerns have been repeatedly acknowledged as the basis of individual legislative immunity. *See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 240-41 (1974); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992). As a practical

matter, they are no less powerful when the legislative entity itself is sued. A suit for damages against the legislative entity transfers a budget dispute to federal court just as surely as a suit against legislators in their individual capacities. Every discretionary trade-off in a municipal budget decision will now be subject to judicial second-guessing.

The complaint in this case seeks damages for past and future lost wages and benefits, embarrassment, humiliation, and reputational injury. It concludes — as is typical — with a demand for trial by jury. And in the absence of any municipal immunity, budget-making by jury trial may become the rule, not the exception. It is easy to see how the multiple motivations of legislators on a budget vote will present a genuine issue of material fact. Juries will thus come to serve as proxies for the larger electorate, and be drawn into the partisan passions of local political life. This concern over the politicization of the courts has been a critical ingredient of legislative immunity from the outset. *Tenney*, 341 U.S. at 378. It also should inform the existence of a derivative municipal immunity in the particular context of a budgetary dispute.

Another important immunity interest overlooked by the majority is a legislator's need for freedom from the burdens of litigation. The Supreme Court has repeatedly stressed that immunity under § 1983 is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). *See also Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Davis v. Scherer*, 468 U.S. 183, 195 (1984). This is so because the consequences of § 1983 actions include "the general costs of subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

All three of *Harlow*'s immunity concerns are implicated in this lawsuit. The *Harlow* burdens are no less significant because the action is brought against the municipal entity; as the only "real" persons involved, legislators still must carry the weight of the impositions and distractions of every case brought. In the case of municipal government, moreover, the consequences of an abrogation of all

immunity are especially severe. Local elected officials may not enjoy the recognition of those who hold state or federal office. Many, however, are public-spirited citizens, and especially in smaller communities, they often serve part-time and for nominal pay. In this case, for example, the Council of the City of Charleston meets only twice a month. *See* City of Charleston, W. Va. Charter and General Ordinances § 21 (Michie 1975). The twenty-six members of the council are paid $2.50 for each meeting they attend, and their yearly salary may not exceed one hundred dollars. *Id.* at § 86. Subjecting part-time officials to the periodic vicissitudes of litigation will, in *Harlow*'s words, both inhibit "discretionary action" and deter "able people from public service." *Harlow*, 457 U.S. at 814. Going from council deliberations on Monday night to depositions on Tuesday morning will not encourage citizens to seek local office. The abrogation of immunity may make the sacrifice involved in public service unacceptable, and help ensure that the hassles of public life outweigh the sense of satisfaction to be found in it.

The majority's belief that individual immunity is sufficient thus does not capture the true scope of the relevant immunity interests. Legislative immunity was created to protect a range of interests, not simply to provide a shield against personal damage awards. *See Tenney*, 341 U.S. at 376-77. Under the majority's rule, litigants will now be able to circumvent these protections by the simple expedient of naming the legislative body in their complaints. The spirit of municipal reform will surely suffer. Local elections often reflect the electorate's desire either for greater public services or for greater property tax relief. If, however, rescission of spending is to be characterized as actionable retribution, and budgetary retrenchment is to be justiciable as a First Amendment claim of political retaliation, then expenditures, once made, will become semi-sacrosanct. All municipal reform is "retaliation" of a sort — reform by definition represents change from the preceding regime which a dissatisfied electorate decided to throw out. The absence of municipal immunity means municipal elections will no longer bring fresh brooms, because council members charged to carry out an electoral mandate will think twice before making any statement or casting any vote that will tie them up indefinitely in court.[3]

[3]My brother Phillips contends that no such chilling effect is present because no Brandeis brief has proclaimed its existence. The failure of

II.

Because immunity interests of great importance are at issue in this case, Congress must be specific if it wishes to abrogate them. It is well-established that when Congress seeks to alter the federal-state equilibrium in a fundamental way, its intention to do so must be "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The Supreme Court has further held in similar contexts that 42 U.S.C. § 1983 fails to provide such a clear and specific statement and thus cannot by itself alter the balance of rights and immunities between the states and the federal system. In *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989), for example, the Court found that § 1983 "falls far short" of the demands of specificity and so does not provide a cause of action directly against the states. *Id.* at 65. Likewise, in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held that § 1983 does not allow punitive damages against localities. It found that "'Congress would have specifically so provided had it wished to abolish the doctrine' " of municipal immunity from punitive damages, yet did not do so in 42 U.S.C. § 1983. *Id.* at 263-64 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).

Language in other cases addressing the subject of municipal liability under § 1983, such as *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658 (1978), appears to reject such a requirement of greater specificity. The majority has meticulously canvassed that language, and I respect the conscientious manner in which it has gone about its task. I do not read the cases discussed by the majority, however, to suggest that the very legislative core of local government is subject to sweeping displacement.

The question of municipal liability presented in this case represents a problem of an entirely different magnitude than that considered in

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officials to act because of fear of § 1983 litigation, however, is not a matter that is apt to be openly expressed or assiduously documented. The elaborate structure of immunities for § 1983 suits is testament enough that some courts, including the Supreme Court, believe this type of litigation chills, even if the fact has thus far eluded my concurring brother.

Monell and its progeny. In *Monell*, for example, the Supreme Court examined municipal liability for an unconstitutional employment policy of mandatory, unpaid pregnancy leave for female city workers. *Id.* at 660-61. It was clearly an attack on an administrative policy of two city agencies, the Department of Social Services and the Board of Education. *Monell* established that a municipality might be liable for the policies of its executive departments. It did not involve a direct challenge to the vote of a municipal legislature, much less a vote on a local budget, and the city council was not even a named defendant in the case.

Likewise, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993), the issue was municipal liability for the actions of police in searching homes for narcotics. Again, the county legislature was not involved and no legislative immunity questions were even implicated. Finally, *Owen v. City of Independence*, 445 U.S. 622 (1980), did involve a suit against a city council, among others. The action there dealt with a due process claim by a city employee who was libelled by a report released by the council when he was discharged from his job. *Id.* at 627-28. The Court refused to grant qualified immunity to the council. *Id.* at 638.

Just like *Monell* and *Leatherman*, however, *Owen* never contemplated the extension of § 1983 liability to legislative votes on local budgets. In *Owen*, the Court did reject the idea that § 1983 preserved a distinction between "discretionary" and "ministerial" functions as a basis for immunity. *Owen*, 445 U.S. at 648-49. Notably, however, the discussion of "discretionary" acts brought within the scope of § 1983 municipal liability focused on policy-making decisions by *executive* bodies. *Id.* It never went so far as to suggest that fundamental *legislative* acts were also subject to federal judicial review, and it never touched upon the budgetary process.

The fact that it did not is significant. Decisions about the allocation of public resources are *the* quintessential task undertaken by an elected representative body, whether it is the City of Charleston Common Council or the Congress of the United States. *See Rateree v. Rocket*, 852 F.2d 946, 950 (7th Cir. 1988) (noting budget-making is the "classic legislative function"). Democracy decides nothing if it cannot set priorities for spending limited public funds. Section 1983

actions that challenge votes on budgetary items are simply different from suits contesting the constitutionality of an executive policy or alleging misconduct on the part of municipal employees. Allowing federal courts to recalculate basic decisions on spending and taxation severely disrupts the balance of federalism. Before improvident interference of momentous importance into municipal government affairs is authorized, it is entirely proper to apply the rule of statutory specificity with some modicum of strictness. The specificity requirement, just like the immunity analysis in the preceding section, must be informed by the unprecedented political nature of the present complaint.

Section 1983 is not sufficiently specific to do the job the majority would have it do. When Congress passed this law in 1871, it had no idea it would metastasize to this extent. The members of the 42d Congress never dreamed they were subjecting local legislative bodies to monetary liability and litigation over individual items in a budget, and so of course failed to include language that would override the presumption against upsetting the federal-state balance. To the contrary, as *Owen* recognized, § 1983 preserved "tradition[s] of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish [such] doctrine[s].' " *Owen*, 445 U.S. at 637 (quoting *Pierson*, 386 U.S. at 555). The language of § 1983, which speaks in only the most general terms of "the deprivation" of federal "rights, privileges, or immunities," does not include an intention to displace local authority over local budgets. If Congress had wished to station the federal judiciary at the vortex of state and local politics, it would have said so. In fact, the judiciary's hand is considerably strengthened if the statutory language makes such a congressional intention clear. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . ." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951). The very generality of § 1983, however, ensures that the impending judicial involvement in municipal budget disputes will be perceived as self-propelled.

III.

An additional difficulty with the majority's position is the gap that it creates in the overall structure of defenses to § 1983 actions. In

striking a balance between vindication of individual rights and limitation of the social costs of litigation, the Supreme Court has always been careful to provide governmental defendants under § 1983 with at least *some* defense to liability. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Thus, individual officials always possess a defense of immunity, whether absolute or qualified. *Id.* at 638-39. Municipalities and municipal bodies, on the other hand, can ordinarily rely on a "custom or policy" defense, which requires proof that the municipality actually "caused" the alleged violation through the adoption of an official policy by a "final decision-maker." *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). As a number of commentators have noted, the "custom or policy" defense for municipalities is in many ways the de facto equivalent of an immunity defense, given the difficulty of establishing the requisite proofs. *See, e.g.*, Peter H. Schuck, *Municipal Liability Under § 1983: Some Lessons From Tort Law and Organizational Theory*, 77 Geo. L. J. 1753 (1989); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N. C. L. Rev. 517, 548 (1987).

Thus, a network of defenses covers nearly the entire spectrum of § 1983 claims. The single circumstance where there is no immunity of any sort is the one we are faced with here — a suit for damages against the local legislature itself. Because the legislature is a public body, not an individual, it possesses no absolute or qualified immunity defense of its own. *See Leatherman*, 113 S.Ct. at 1162. Moreover, because the legislature is nearly always the "final decision-maker" in the locality, it cannot avail itself of any meaningful custom or policy defense. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986). I am not suggesting, of course, that the city council lacks a *Pembaur* "custom or policy" defense for any technical or formal reason of pleading. Rather, the point is that as a practical matter, the *Pembaur* defense is of no value to a city council because it is automatically a final decision-maker. Thus, the toughest hurdle of the defense is easily bypassed in any challenge to a legislative budget vote. In contrast, courts have crafted a much stronger "custom or policy" defense for municipal executive bodies by requiring strict proof that the action complained of actually originated from a true "final decision-maker." *See Praprotnik*, 485 U.S. at 127. In sum, a legislative defendant which should by all rights enjoy the greatest protection from § 1983 liability is left in the most defenseless position of all.

A testimonial privilege for individual legislators, to which the majority alludes, *see* majority opinion, note 8, is no answer to this problem. For one thing, the source and scope of such a privilege has not been explained. For another, the practical value of such a privilege is virtually nil. In fact, it makes the dilemma of municipal liability for legislative acts even worse. The losing legislative faction in a budget dispute will readily waive the privilege and testify in court. At that point, the value of any testimonial privilege to the prevailing side becomes as tenuous as the value of, say, the Fifth Amendment privilege against self-incrimination after the prosecution has presented its case-in-chief. Any legislator invoking the privilege will be the object of suspicion in the courtroom, and the municipality will be left in the untenable position of trying to stave off liability in the face of one-sided evidence.

The end result is that strict liability for this narrow class of § 1983 defendants, which serves to "convert[ ] municipal governance into a hazardous slalom through constitutional obstacles that are often are unknown and unknowable." *Owen*, 445 U.S. at 665 (Powell, J., dissenting). Together with the perception of municipalities as deep pockets, this gap in § 1983 defenses generates a perverse incentive to sue local councils, thereby ensuring these lawsuits will be targeted where they can do the most harm to representative government.

The simple solution to this problem is to extend the well-established immunity of individual legislators to cover the legislative body whenever a cause of action "would perforce require testimony of the legislators involved regarding their motives" in a legislative vote. *Hollyday v. Rainey*, 964 F.2d 1441, 1443 (4th Cir.), *cert. denied*, 113 S.Ct. 636 (1992). We have recognized the need to extend legislative privileges to limit the burdens on individual legislators in other kinds of suits against municipalities. *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir.), *cert. denied*, 498 U.S. 815 (1990) (ADEA suit); *Schlitz v. Virginia*, 854 F.2d 43, 45 (4th Cir. 1988) (same). The need for such protections is no less compelling in the context of 42 U.S.C. § 1983.

IV.

The district court's opinion in this case was short and to the point. It stated that "plaintiffs' case squarely attacks a classic legislative

function of the Council, its vote on the City budget." The court also noted that resolution of the dispute "would necessarily require an examination of the Council's motive for its vote." Finally, it quoted the Seventh Circuit's holding that a budget vote is not rendered an "administrative" employment decision merely because it impacts city employees:

> Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one. . . . Employment decisions are not administrative when accomplished through traditional legislative functions. They are not "employment decisions" at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct.

Rateree, 852 F.2d at 950-51.

I would affirm that judgment. Providing immunity here would not result in any absence of remedies for those opposed to the actions of local legislatures. *See Harlow*, 457 U.S. at 814 (explaining that one basis for rejecting immunity is to avoid cutting off only available avenue for the rectification of constitutional injuries). The correctives for abuse of power in this context are legion. First and foremost, any local legislature that oversteps its bounds must answer to the electorate itself. *See Tenney*, 341 U.S. at 378 ("Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."). *See also* The Federalist No. 57, at 385 (James Madison) (B. Wright, ed. 1961) (arguing that greatest check on the legislature is the vigilant "spirit which actuates the people of America"). The democratic process relies on the voters, not the courts, as the first line of defense against legislative excess.

Legislatures themselves possess effective internal mechanisms for countering misbehavior in the give-and-take of public debate and deliberation. Also, legislative action in a multi-member body requires

coalition-building among individual legislators, which acts as a further check on arbitrary or extreme conduct. *See* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government*, 86 Mich. L. Rev. 930, 943-44 (1988). Many local legislatures have internal disciplinary powers as well. In this case, for example, members of the Common Council may be removed from the legislature for "official misconduct" by either a two-thirds vote of the council or by the circuit court of Kanawha County. City of Charleston Charter and General Ordinances § 19. Public scrutiny through the press also exposes and deters legislative action that crosses permissible lines.

Finally, state laws, both civil and criminal, provide additional means by which a wayward local legislature can be held accountable. *See Long v. City of Weirton*, 214 S.E.2d 832, 859 (W. Va. 1975) (allowing state law suits against municipalities in West Virginia); City of Charleston Charter and General Ordinances § 32 (providing criminal sanctions for corruption by council members). *See also, e.g.*, N. C. Gen. Stat. § 160A-485 (1976); S.C. Code §§ 5-7-70, 15-77-230 (1979); *Virginia Electric & Power Co. v. Hampton Redevelopment & Housing Authority*, 225 S.E.2d 364, 368 (Va. 1976). Indeed, the majority fails to acknowledge that municipalities are subdivisions of the states and are themselves creatures of state law. *See* W. Va. Code § 8-1-1 et. seq. (1990) (providing for creation and regulation of West Virginia municipalities). The primary responsibility for legal regulation of localities has, under our system of federalism, always fallen to the states. Federalism is no mere "political theory," (*see* concurrence of Phillips, J.) but a structural premise of our Constitution. So, for that matter, is democracy. The idea that local legislatures will run amok if budget struggles are not the subject of § 1983 actions in damages runs counter to the realities of checks and balances in our democratic system.

V.

Many disputes must be resolved by litigation, but this is not one of them. In the end, litigation such as this robs local politics of any pretense to finality. The abrogation of immunity in the context of a municipal budget battle further signals the demise of the political question doctrine, upon which courts have long depended to distance

themselves from partisan affairs. The rule of law was not meant to be synonymous with the transfer of purely political business to our courts. There is no more political a business than legislative appropriations. Abraham Lincoln never spoke of government "of the judiciary, by the judiciary, and for the judiciary." He knew from sad experience that judicial involvement carried its own special dangers of abuse, and he understood that true democracy reserved to the people the right to determine their own destiny.

Judge Russell and Judge Widener join in this dissent.